

QUEEN'S BENCH,
APPEAL SIDE.

No. 32.

J. Gibb & al.,

APPELLANTS.

and

Bacon Life and Fire Assurance Company,

RESPONDENTS.

Appellants' Case.

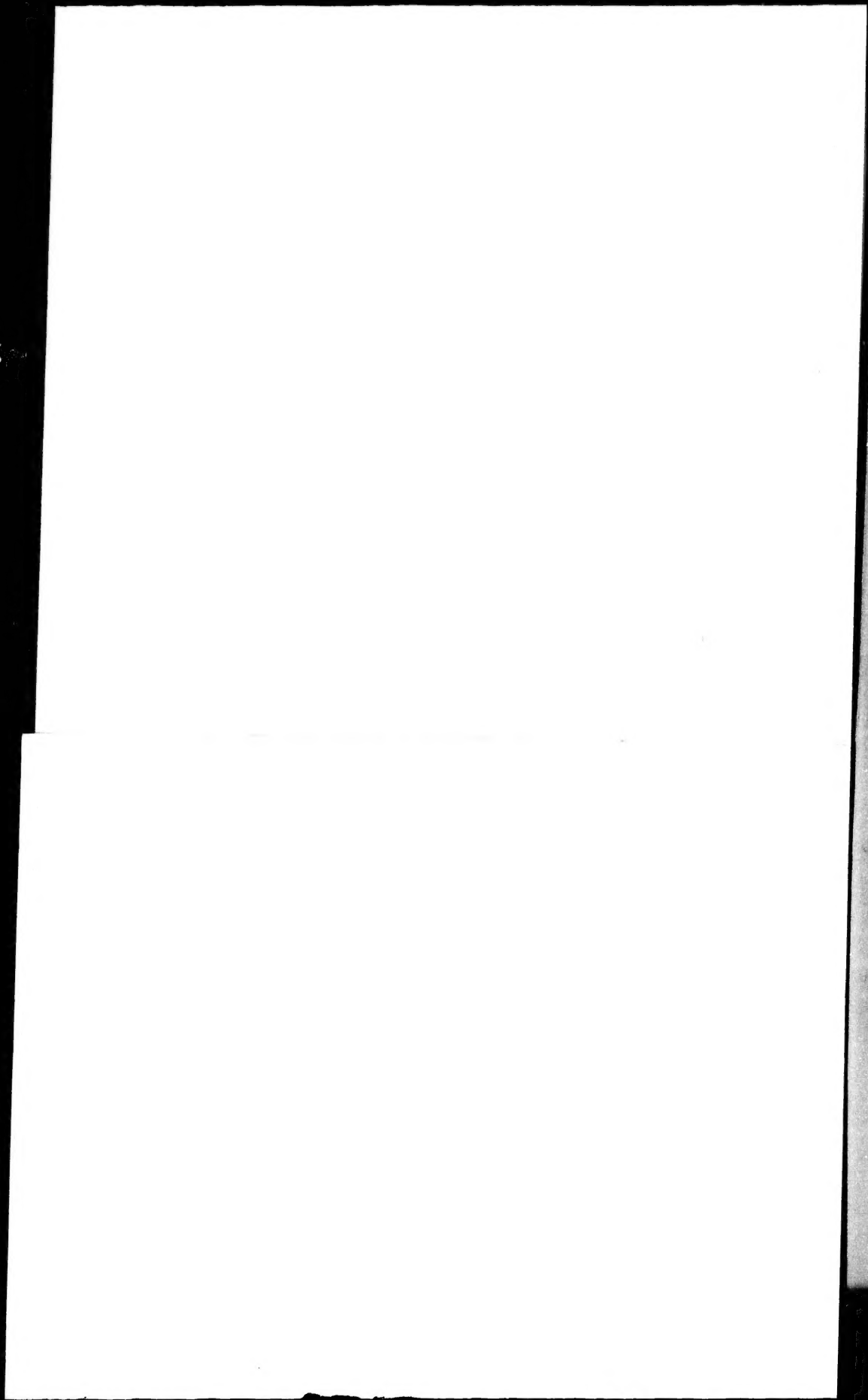
Decree 1889

F. C. VANNOVOUS,
For Appellants.

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QUEEN'S BENCH,

AT 711A, 712B.



PROVINCE OF CANADA,
Lower Canada.

IN THE QUEEN'S BENCH,
APPEAL SIDE.

J. Gibb & al.,

APPELLANTS,

AND

Beacon Life and Fire Assurance Company,

RESPONDENTS.

APPELLANTS' CASE.

ON the twenty ninth of April 1856, Messrs. Gibb & Ross, insured the steamer "Tinto" to the extent of one thousand pounds currency with the Respondent and they issued a Policy of Insurance in the following terms:

"Whereas Messrs. Gibb & Ross and others owners, has paid to the Beacon Life and Fire Assurance Company the sum above stated to have been paid on the granting of this Policy and has agreed to pay to said Company at the period above mentioned for each year ensuing the annual renewal payment above specified during the continuance of this Policy for assuring against loss or damage by fire not exceeding in each case the sum hereinafter mentioned on the property herein described in the places hereinafter particularized and not elsewhere unless allowed by Indorsement previously made viz: The hull tackle apparel and other articles of out fit including boats, furniture, linen, plate, glass, and earthenware engine and machinery of the steam propeller "Tinto," now lying at Sorel to ply between Quebec and the Upper Lakes, including winter risks refitting in the spring, fires allowed to be made during the continuance of the present Policy."

"Now be it known that so long as the said assured shall duly pay the said premium to the said Company at the time aforesaid and the Directors of the said Company for the time being shall agree to accept the same the capital stock and funds of the said Company shall be subject and liable to pay or make good to the said assured, his, her, or their executors, administrators or assignees (provided the interest in this Policy be so assigned with the consent of the Directors) all the damage and loss which the said assured shall suffer by fire on the property herein mentioned not exceeding in each case respectively the same hereinbefore specified on the property hereinbefore set forth."

"Provided always that this Policy and the assurance hereby made shall be subject to the several conditions and regulations herein and hereon expressed so far as the same are or shall be applicable in the same manner as if the same respectively were repeated and incorporated in this Policy."

"Provided also and it is hereby expressly declared and agreed between and by the said Company and the assured that this Policy and anything herein contained shall in no case extend or be deemed or construed to extend personally to charge or render liable the respective proprietors of the said Company or any of them or any of their heirs executors or administrators to any claim or demand whatsoever in respect of this Policy or of the assurance hereby made; but that the capital stock and funds and corporate property of the said Company shall alone be charged and liable to answer all claims and demands by virtue of this assurance or incidental thereto enjoined to the said Policy are the following conditions that is to say:

" 1st. That upon the insurance of any property, whether buildings or goods deposited therein, the party or parties making the same shall specify of what materials the walls and roofs of such buildings are respectively constructed, where situated, and by whom occupied; and whether private dwellings, or how otherwise; whether any manufacture or hazardous trade be carried on, or any hazardous articles be deposited or kept therein, and if so, shall describe the nature and qualities thereof; whether any steam engine, furnace, kiln, stove, coakle or other apparatus whereby heat is produced, (common fire-places, stoves and ovens for domestic use excepted) be erected on the premises and if so shall give a particular description of the nature and construction thereof respectively; and if such specification do not truly and circumstantially describe the property and the several particulars regarding the same as aforesaid, so that the nature and degree of the risk may be justly estimated, the Policy or insurance thereon shall be null and void. "The insurance on any building shall not be held to include anything outside thereof, such as clapboarding, blinds, galleries, porches, *appentis*, sheds or other buildings, except the same shall be specially mentioned and valued in the Policy; no furniture usually denominated fixtures, machinery or other legal or constructed immovables contained in any building shall be held to be insured, as appertaining or belonging thereto, except such fixtures as shall be specially named in the body of the Policy."

" 2nd. That no insurance shall be conclusive or binding on this company, unless the premium be previously paid thereon and persons desirous of continuing annual insurances must make their respective payments of the premium thereon on or before the commencement of each and every succeeding year, otherwise such insurance will expire; and that the only evidence of such payments shall be the printed receipts issued from the office and witnessed by one of the clerks or agents of the Company."

" 3rd. If there be any assurance at any other office of the property assured at this office, notice of every such other assurance must be given, and the same with the several amounts thereof must be stated either in the Policy, or by an indorsement upon it, otherwise the assurance with this office is void and the assured not entitled to recover or be paid in case of loss; and in the event of any other assurance with any other office this company will pay its rateable portion only of any loss, having regard to every other subsisting Policy in whose name soever such Policy may be."

" 4th. In case of any alteration being made in a building assured or containing any property assured or of any steam engine, stove, kiln, furnace, oven, or any other description of fire heat being introduced or of any trade business, process or operation being carried on or goods deposited therein not comprised in the original assurance or allowed by indorsement thereon or the making of any communication from one building to another notice thereof must be given and every such alteration must be allowed by indorsement on the Policy and any further premium which the alteration may occasion must be paid; and unless such notice be duly given, in writing to the company or the agent, such premium paid and such indorsement made no benefit will arise to the assured in case of loss. If the risk be increased by the erection of buildings or by the use or occupation of neighbouring premises or otherwise, or if for any other cause the company shall so elect, it shall be optional with the company to cancel this Policy after notice given to the assured or his representatives of their intention so to do, in which case the company will refund the premium for the unexpired time."

" 5th. Leaseholders, trustees and all persons entitled to houses, buildings and other assurable property in reversion may assure the amount of their respective interests in such buildings and property provided the nature of the tenure or interests be duly specified. Persons holding goods in trust or on commission, for the value of which they are responsible in case of fire may assure the same but the same must be assured as such, otherwise the Policy will not extend to cover such property."

" 6th. Upon the death of persons having property assured at this office it will not be necessary to make a fresh assurance provided the Policy is continued (as it may be) by indorsement to the person entitled thereto; or the interest in a Policy may be transferred, provided notice of any such change of interest or transfer is given and allowed by indorsement on the Policy. If goods be removed to a new situation notice of such removal must be given and allowed by indorsement on the Policy and a suitable premium paid if the risk be thereby increased otherwise the Policy will not extend to cover such goods and the Policy from the time of such removal will be void."

" 7th. No loss occasioned by or through any invasion, rebellion, riot, tumult, insurrection or commotion or by or through any military or usurped power or foreign enemy will

"be made good nor any loss by theft at or after a fire, Books of accounts, deeds, writings, manuscripts, securities, bills, bonds, ready money and gunpowder are not under any circumstances assured. The Company will not be responsible for any loss arising on hay or corn destroyed or damaged by its own natural heating but will pay the loss which may happen to any other contiguous property assured in consequence of fire so occasioned. No loss will be allowed for any goods or utensils which may be destroyed or damaged while undergoing any process of manufacture in or by which the application of fire heat is used. *The Company is not responsible for or liable to pay any loss or damage occasioned by or through any explosion, and if more than twenty pounds weight of gunpowder shall be upon the premises at the time when any loss happens such loss will not be made good.* The use of gaslights is allowed provided the gas is not made on the premises but this Company will not be responsible for any loss or damage occasioned by or through the use of camphene."

"8th. In cases of fire or of loss or damage thereby or of exposure to loss or damage thereby it shall be the duty of the insured to use all possible diligence in saving and preserving the property. And if they shall fail so to do this Company shall not be held answerable to make good the loss and damage sustained in consequence of such neglect and it is mutually understood that there can be no abandonment to the insurers of the subject insured."

"9th. Loss by lightning will be made good by this Company so far only as either the building or effects assured may have been actually set on fire thereby and burnt in consequence thereof."

"10th. All persons sustaining any loss or damage by fire are forthwith to give notice thereof to the Company at their office in Kingston, or to the Company's Agent through whom the assurance was effected, or resident near where the fire occurred, and within fifteen days after the fire occurring deliver in writing as particular an inventory of their loss or damage as the nature of the case will admit. Such inventory to be in writing, signed by the parties, and to contain a list of the furniture, stock in trade, and goods, and other articles claimed for; and with respect to any buildings or erections destroyed or injured, a detailed specification and estimate of the loss or damage, to be furnished, showing the sum necessarily required to be expended to restore or reinstate such buildings or erections, in all cases, estimating the worth, whether relating to buildings or furniture, stock in trade, or other goods, according to the quality and actual condition and value of the property at the time of the fire; and the parties assured must (when required) make proof of such loss by the declaration or affirmation (before the nearest resident magistrate) of themselves, and of their servants; and by producing their invoices and books of account, and by all other vouchers as shall be reasonably required, without which no money shall be recoverable. A copy of the written parts of the Policy to be given in the affidavit of the claimant in all cases. But if there appear any fraud, deceit, or evil practice, in the claim made for any loss, or any false declaration or affirming in support thereof, or that the fire shall have happened by the procurement or wilful act, means, or connivance of the insured or claimant, or any collusion or false evidence, or deceit, or wilful mis-statement, or fraudulent mis-description in the nature or value of the property destroyed, damaged or claimed for, the claimant shall, in every such case forfeit all right to restitution or payment under or by virtue of his, her, or their Policy."

"11th. Where property insured by this Company is damaged by removal from a building in which it is exposed to loss by fire, such damage shall be borne by the insured and the insurers pro rata in the proportion that the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant."

"12th. It is furthermore hereby expressly provided, that no suit or action of any kind against this Company, for the recovery of any claim upon, under or by virtue of this Policy, shall be sustainable in any Court of Law or Chancery, unless such suit or action shall be commenced within the term of six months next after the loss or damage shall occur; and in case any suit or action shall be commenced against said Company after the expiration of six months, next after such loss or damage shall have occurred the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced."

"13th. Payment of losses shall be made in sixty days after the loss shall have been ascertained and proved and in case differences shall arise touching any loss or damage it shall be submitted to the judgment of arbitrators indifferently chosen, whose award in

"writing shall be binding on the parties half the fees for arbitrators to be paid by the party insured. In case of any loss or damage to the property insured it shall be optional with the Company to replace the articles lost or damaged with others of the same kind and equal goodness and to rebuild or repair the building or buildings within a reasonable time giving notice of their intention so to do within thirty days after the preliminary proofs shall have been received at the office of the Company."

"14th. The company will not be answerable for any loss where fires are used in buildings unprovided with good and substantial brick or stone chimneys, or in consequence of stove or stove pipes placed and used contrary to law or in consequence of the infringement of any law in force for the suppression or prevention of fires or where stove pipes are carried through the exterior walls or roofs of any house, or building, or for any loss by fire in any building, under construction or repair, or moveables therein wherein carpenters, joiners or other workmen are employed unless the special consent of the company be first obtained and endorsed on the Policy."

"15th. The agents of the company shall in no case be made personally responsible on account of any legal or other investigation which they may find it necessary to institute for the satisfaction of the company, nor can their personal property be attached on account of any alleged loss by the assured. If the assured should commence such proceedings against the agent, it is hereby declared and stipulated, that the said assured shall forfeit thereby all claim upon the company for loss or damage sustained, and shall moreover be responsible for all expenses which shall accrue in consequence of his proceedings. All notices are required to be made in writing and all indorsements and allowances must be signed by the manager or one of the clerks of the company."

On the 17th of July 1856 whilst the foregoing Policy was in force, the steamer Tinto near the place called Nine mile Point, on lake Ontario, was casually destroyed by fire.

After considerable correspondence between the Appellants and Respondents relating to the claim which they made under the said Policy the Appellants on the second of May 1857 resorted to an action to compel the Respondents to pay the one thousand pounds insured upon the said steamer under the said Policy.

The Appellants declaration sets forth the Policy the destruction of the steamer and their compliance with the conditions which applied to the contract made by them with the Respondents.

To this declaration the Respondents pleaded by a *défense au fonds en fait* and by a perpetual peremptory exception alleging three grounds of defence as follows:

"That the said Policy of insurance in the said declaration mentioned was made by the said defendants under and subject to certain conditions and regulations therein and thereon expressed by which said conditions it was among other things agreed between the said defendants and the owners of the property insured by the said Policy, that if more than twenty pounds weight of gunpowder should be upon the premises at the time when any loss should happen such loss would not be made good and the said defendants say that at the time that the steam propeller called the "Tinto," was destroyed by fire as in the said declaration mentioned there was on board of the said vessel a larger quantity of gunpowder than twenty pounds weight by reason whereof the said defendants were and are not responsible for any loss which the said plaintiffs or the persons in whose favor the said Policy was made may have suffered by reason of the said fire."

"And for further plea in this behalf the said defendants say that it was in and by the said conditions of the said Policy amongst other things further agreed that no suit or action of any kind against the defendants for the recovery of any claim under or by virtue of the said Policy should be sustained in any Court of Law or Chancery unless such suit or action should be commenced within the time of six months next after the loss or damage to property insured should have occurred. And the said defendants say that the destruction by fire of the said steam propeller called the "Tinto," in the said declaration mentioned occurred more than six months, previous to the institution of this action."

"And for further plea in this behalf the said defendants further say that it was agreed between the said defendants and the said James Gibb, James Gibb Ross, John Ross, William Ross and the said late Alexander Henderson, owners of the said steam propeller

" called the Tinto, in and by the conditions subject to which the said Policy of Assurance was made as aforesaid that all persons sustaining any loss or damage by fire were forthwith to give notice thereof to the company at their office in Kingston or to the company's agent through whom the assurance was effected or resident near where the fire occurred, and within fifteen days after the fire occurring should deliver in writing as particular an inventory of their loss or damage as the nature of the case would admit: the said inventory to be in writing, signed by the parties and to contain a list of the furniture, stock in trade, and goods and other articles claimed for; and with respect to any buildings or erections destroyed or injured a detailed specification and estimate of the loss or damage to be furnished showing the sum necessarily required to be expended to restore or reinstate such buildings or erections in all cases estimating the worth whether relating to buildings or furniture, stock in trade or other goods according to the quality and actual condition and value of the property at the time of the fire, and the parties assured must when required make proof of such loss by their declaration or affirmation before the nearest resident magistrate of themselves and of their servants and by producing their invoices and books of account and by all other vouchers as might be reasonably required, without which no money should be recoverable, a copy of the written parts of the Policy was also to be given in the affidavit of the claimants in all cases.

" And the said defendants say that the said plaintiff have not nor did the said James Gibb, James Gibb Ross, John Ross, William Ross and the said late Alexander Henderson in his life time in any respect comply with the said conditions last mentioned and did not forthwith give notice to the said defendants at their office in Kingston or elsewhere or to any of their agents, of the alleged damage and loss sustained by the burning of the said steam propeller called the "Tinto" and did not within fifteen days after the occurrence of the said fire deliver in an inventory of the loss or damage which had occurred in the manner required by the conditions of the said Policy and did not (though required so to do) make proof of such loss in the manner so required by the said conditions. By reason whereof according to the tenure of their said contract the said plaintiffs have lost all claim which they otherwise might have had under the said Policy by reason of the loss and damage by fire to the said steam propeller "Tinto" and the said defendants further say that it was covenanted and agreed in and by the conditions of the said Policy that in case any suit or action should be commenced against the said Company after the expiration of six months next after such loss or damage should have occurred, the lapse of time was to be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced. And the defendants say that at the time of the institution of the present action more than six months had elapsed since the occurrence of the alleged loss and damage to the said steam propeller "Tinto," by reason whereof in virtue of the said contract the said claim of the plaintiffs must be held to be invalid."

The Appellants answered generally, and also specially as follows, "that for a long time after the loss by them sustained and claimed by the present action they the Plaintiffs were in treaty and communication with the Defendants for the payment of the same, and that the present action was brought immediately upon the absolute refusal of the Defendants to pay the said Plaintiffs being made known to them the Plaintiff, and that they the Plaintiffs had every reason to expect and did expect that the said Defendants would pay the amount claimed by the present action without being sued for the same and that the said action was not brought by the said Plaintiffs within the said time, because the said Defendants from time to time promised to pay and settle the said loss, and by that means only induced the said Plaintiffs to protract the institution of the present action, and that the said Defendants are barred from all right to invoke the said condition and have waived the same."

A general replication was filed by the Respondents.

The Appellants having declared their option of a trial by Jury, the Honorable Mr. Justice Meredith on the 6th of April 1858, settled the questions of fact to be submitted

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was agreed John Ross, propeller

to the Jury, and the Jury which was afterwards empannelled to try this cause returned their verdict as follows :

QUESTION.

1st. Did James Gibb, James Gibb Ross, John Ross and the late Alexander Henderson then the owners of the Steamer Tinto effect an insurance upon that Steamer with the Defendants, at the time, in the manner and for the sum stated in the declaration in this cause, and did the Defendants there upon subscribe and issue their Policy of Assurance, as therein set forth.

Answer.—Yes.

2nd. Was the said Steamer Tinto consumed by fire during the continuance of such Policy of Insurance, and within the places particularized in the said Policy whilst the said above named parties were owners thereof as aforesaid, and if so, when, and did such fire happen in the manner mentioned in the declaration of the Plaintiffs in this cause filed.

Answer.—Yes, on the 17th day of July 1856.

3rd. At the time the said steamer Tinto was so consumed by fire was there any quantity of gunpowder on board the said steamer, and if so, what weight or quantity.

Answer.—Yes, we find that a package containing about one hundred pounds of powder was on board as freight and which the owners of the said Steamer were not precluded by their Policy from carrying.

4th. Did the said James Gibb, James Gibb Ross, John Ross, William Ross and the late Alexander Henderson as the plaintiffs, forthwith after the said steamer was so consumed by fire give notice of the said loss to the said defendants in the manner required by the said Policy of insurance ?

Answer.—Yes.

5th. Did the said above named persons or did the plaintiffs after the occurrence of the said fire deliver in to the defendants an inventory or statement of the loss which had so occurred in the manner required by the conditions of the said Policy of insurance and if so, when.

Answer.—Yes. Satisfactory proof of loss was given immediately.

6th. Did negotiations take place between the plaintiffs and the defendants in relation to the said loss ? was the present action brought immediately upon the absolute refusal of the defendants to pay the said plaintiffs being made known to them the said plaintiffs.

Answer.—Yes.

7th. Were the plaintiffs induced by any promises on the part of the defendants to postpone the institution of the present action beyond the period of six months after the said loss ?

Answer.—Yes.

8th. What was the amount of loss or damage sustained by the said James Gibb, James Gibb Ross, John Ross and the late Alexander Henderson, by reason of the said steamer Tinto having been so consumed by fire as aforesaid.

Answer.—Five to six thousand pounds.

At the trial the Appellants offered evidence to prove that it was customary to carry on freight, gunpowder, in crafts navigating the inland waters of this Province, such as the steamer "Tinto," but this evidence was ruled inadmissible by Mr. Justice Meredith, who presided at the trial.

The verdict as rendered by the Jury was unanimous, and the facts found and particularly in answer to the third question were favorable to the Appellants.

The Respondents subsequently to the rendering of this verdict inscribed the cause for a hearing upon the merits. No motion was made by them for a new trial and in the absence of such a motion it must be assumed that they acquiesced in the verdict as rendered. The facts, as found by the Jury, cannot be disturbed by any proceeding other than by an application for a new trial. The Respondents however have innovated upon this well settled practice by seeking to dispose of a part of the answer by a motion which they made to the following effect:

"The said Beacon Life and Fire Assurance Company move that inasmuch as the Jury before whom this cause was tried on the twenty ninth day of April last, were, in answer to one of the questions submitted to them required to find what quantity or weight of gunpowder was on board of the Steamer Tinto, at the time of her loss, and inasmuch as the said Jury finding and stating such quantity or weight, have added to their said answer a further statement or finding to the effect that the said gunpowder was carried as freight and that the Plaintiffs were not restricted by the Policy, from carrying it and inasmuch as such further statement or finding was not pertinent to the pleading and did not flow from any matter raised by the said pleading in the cause inasmuch as the right of the said Plaintiff to carry the said weight of gunpowder was not submitted to the said Jury and by reason such additional statement or finding aforesaid is illegal irregular and unwarranted the same be rejected suppressed and set aside with costs."

It will be observed that the reason given in this motion for striking out a portion of the verdict are "*that the further finding was not pertinent to the pleadings and did not flow from any matter raised by the said pleadings in the cause and inasmuch as the right of the said plaintiff to carry the said weight of gunpowder was not submitted to the said Jury.*" What is the fact? The Policy is, in its terms, open and points to the necessity of interpreting how far the conditions endorsed shall be held applicable to the contract. Unless this were so, the proviso "*that this Policy and the assurance hereby made shall be subject to the several conditions and regulations herein and hereon expressed so far as the same are or shall be applicable,*" would be inoperative. The Appellants in their declaration have taken this view of the contract and so have the Respondents by invoking in bar to the Appellants right to recover "*that there was more than twenty pounds in weight of gunpowder on board of the Tinto at the time of her destruction.*" The Respondents however do not state in their plea that the condition or regulation forbidding the assured to have more than twenty pounds weight of gunpowder upon the premises was applicable to the said Policy; this averment in their plea was essential. It will thus be seen that the intention of the Respondents was to raise an issue as to the applicability of that condition or regulation and that there is therefore misconception, in the reasons given in the said motion, whereby it was pretended that the fact found was not pertinent to the issue between the parties. There was a direct issue raised upon that condition by the Respondents.

On the 6th October 1858, the parties were heard on the merits of the cause. On the 18th December 1858 a rehearing was ordered. On the 17th January 1859, a second rehearing was ordered. On the 5th March 1859, this cause was heard upon the merits and on the 11th March 1859, another order was made for a rehearing. These repeated hearings were before the Honorable Mr. Justice Meredith, who presided at the trial.

On the 2nd May 1859, the cause was again heard, before the Honorable Mr. Justice Chabot, and on the 1st June 1859, the following judgment was rendered.

"La Cour ayant entendu les parties par leurs Avocats respectifs tant sur la motion de la défenderesse du premier mai mil huit cent cinquante huit tendant à faire retrancher une partie de la réponse du Jury à la troisième question à lui soumise, que sur les mérites de la demande en cette cause, examiné les preuves, plaidoyers et procédures du dossier et sur le tout mûrement délibéré considérant que les Jurés en réponse à la troisième question à eux faite et soumise ont rapporté que lors de l'incendie perte et destruction du steamer Tinto, mentionné en la dite question, il y avait abord d'icelui

"environ cent livres de poudre comme fret et ont ajouté: "Ce que les propriétaires du dit steamer n'étaient pas empêchés par leur police de transporter," et considérant que les dits Jurés en rapportant ainsi et ajoutant ainsi ont rapporté et jugé sur une chose que ne leur était pas soumise ni en issue de fait entre les parties, et qu'ils ont ainsi pris sur eux de rapporter sur une question de droit et qu'en conséquence les dits Jurés ont excédé leurs pouvoirs et attributions, accorde la dite motion de la dite défenderesse et ordonne que tout l'ajouté susdit à la réponse du dit juré à la dite troisième question tendant à dire que les demandeurs n'étaient pas empêchés par leur police de transporter la dite quantité de poudre soit et il est par les présents rejeté supprimé et mis de côté avec dépons contre le demandeur et la Cour considérant que la preuve et les réponses des jurés aux questions, à eux soumise, il est constaté que lors de l'incendie perte et destruction du steamer *Tinto*, mentionnée en la déclaration et en la police d'assurance mentionnée en la dite déclaration au temps et lieu mentionnés en la déclaration il y avait à bord du dit steamer, une quantité de poudre excédant vingt livres pesant, et ce en contravention et violation d'une des conditions de la dite police d'assurance, tel qu'allégué par le premier chef de l'exception péremptoire en droit perpétuelle filée en cette cause par la défenderesse maintient le dit premier chef de la dite exception et en conséquence renvoie l'action en cette cause avec dépons contre les demandeurs en faveur de la défenderesse distraits en faveur de Messieurs Holt et Irvine, Procureur de la dite défenderesse."

The Appellants are aggrieved by this judgment. The parties having resorted to a trial by jury, withdrew from the decision of the Court all matters of fact in issue between them. The jury were the sole judges of the fact. They returned a verdict and that verdict stands unimpeached. The finding has been accepted by the parties, and neither can enter upon the evidence to demonstrate error in the finding nor to explain it. Whether there is or not evidence to support it, cannot now be made a subject of enquiry; nor can the means by which they arrived at the verdict be investigated. Had the Respondents believed that the verdict was not supported by evidence, they had a remedial course before them, in a motion for a new trial. No such motion was made. The verdict must be taken as a whole, and so taken, it stands for the Appellants. It is submitted that the jury have the right to return what was the true intention of the parties when making the contract, where there is ambiguity in, or a doubt arising out of the language used. In this case the proviso expressly points to the necessity of determining what conditions shall and what shall not apply to and form part of the contract. The conditions on the policy were therefore not absolute. They must be proved or shown to apply before they are admitted as part of the contract; and the Company should have alleged the application of such of them, as they relied on. The determination of the application of the condition relating to gunpowder was a matter of fact and therefore within the cognizance of the jury. The condition itself shows the need of outside evidence to explain the term "premises" in order to attach it to the Policy. The term "premises" is understood, in common parlance to relate to *houses and lands*, and in french is rendered as *terres, maisons*. In this sense it is plainly used in the 1st. condition and as plainly in the 7th. condition. Take what precedes and follows that term in both those conditions and by that means (ex-antecedentibus et consequentibus optima fit interpretatio) an intelligible meaning will be given to it. The Respondents desire to torture language and to make "premises" apply to a steamer, a moveable object. It was for them to have explained that "premises" in the accepted language of insurers applied to a steamer. They failed to do so. The Jury have given to the contract and that term an interpretation by declaring that that condition has not been violated; thus emphatically declaring that "premises" does not mean a steamer. It is but right that the Respondents should be judged strictly where they come before the Court, with a plea claiming exemption from their covenant by reason of a pretended non observance of a condition, the breach of which (did it apply) was neither the proximate or remote cause of the loss. The condition speaks of gunpowder but the verdict does not. The Court below in its judgment seems to have considered the evidence and to have based its judgment partly thereon. The Appellants know not how for it may have been influenced by the evidence. If in any measure, then they submit that that Court entered upon a branch of the case, of which it had been divested by the operation of the Jury. The verdict must be taken as to the facts and as it is silent as to gunpowder, the Court cannot supply the defect. The spirit of our jurisprudence does not favor forfeitures or penalties, and Courts will not lean to them where an injustice follows. The Appellants have paid a full premium for a risk, which the Respondents assumed but which they now seek to avoid, though other companies have paid the Appellants.

Supposing that the Court views the contract as one for construction; in such case it

will be forced to allow that the 1st, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 14th conditions, apply to risks on land, and are such, as are invariably attached to *assurances terrestres*. Hence the propriety and indeed the necessity of the proviso. To argue that one of a series of conditions belongs to the contract whilst the others, nine in number, and *ejusdem generis* plainly do not, is a process of reasoning which it will be difficult to recognise as convincing. Did the condition relating to gunpowder stand isolated, then the Company with a shade of reason might invoke it; but it forms part of the 7th condition and is preceded by "No loss occasioned by or through any invasion rebellion riot, tumult, insurrection, or commotion or by or through any military or usurped power or foreign enemy will be made good nor any loss by theft at or after a fire, Books of accounts, deeds, writings manuscripts, securities, bills, bonds, ready money and gunpowder are not under any circumstances assured. The Company will not be responsible for any loss arising on hay or corn destroyed or damaged by its own natural heating but will pay the loss which may happen to any other contiguous property assured in consequence of fire so occasioned. No loss will be allowed for any goods or utensils which may be destroyed or damaged while undergoing any process of manufacture in or by which the application of fire heat is used," and is followed by "the use of gaslights is allowed provided the gas is not made on the premises but this Company will not be responsible for any loss or damage occasioned by or through the use of camphene." Thus, it is found hedged in by other condition contained in the same paragraph which refer to houses and moveables on land.

The Appellants are confident that upon a review of the proceedings, this Court will grant them the relief, which they respectfully solicit.

Quebec, 7th December 1859.

F. C. VANNOVOUS,

For Appellants.

